

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE  
August 4, 2009 Session

**TIPPY LYNN BAILEY v. ROGER VALL GROOMS, ET AL.**

**Appeal from the Circuit Court for Cocke County  
No. 29, 323-111 Rex Henry Ogle, Judge**

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**No. E2008-01520-COA-R3-CV - FILED OCTOBER 28, 2009**

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This negligence action arose from a gunshot injury suffered by the plaintiff during an altercation at a social gathering held on Defendant Pat Proffitt's land. Defendant Roger Vall Grooms fired the weapon that injured the plaintiff, and Defendant Jessie Proffitt was also involved in the altercation. Defendant Pat Proffitt filed a motion for summary judgment. After a hearing, the trial court entered an order of summary judgment for Defendant Pat Proffitt, holding that hosting an adult party on his property did not create a legal duty on the defendant's part to prevent adult attendees from becoming intoxicated and injuring each other. The plaintiff timely appealed. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court  
Affirmed; Case Remanded**

JOHN W. MCCLARTY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Carl R. Ogle, Jr., Jefferson City, Tennessee, for Appellant, Tippy Lynn Bailey.

Ben W. Hooper, III, Newport, Tennessee, for Appellee, Pat Proffitt.

**OPINION**

**I. BACKGROUND**

The events that gave rise to this action began on Saturday, October 17, 1998, when Plaintiff Tippy Lynn Bailey attended a party given by Pat Proffitt on property owned by Mr. Proffitt and located about two miles away from Mr. Proffitt's home. The party was a "cook-out" and was held as a combined birthday celebration for Mr. Proffitt's adult sons, Jessie Proffitt and his younger brother Ben Proffitt, ages twenty-six and twenty-four respectively at the time of the incident. Mr. Bailey, who was forty-one years old, had been invited by Ben.<sup>1</sup> It is undisputed that no minors

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<sup>1</sup>For clarity in identifying members of the same family, this court will refer to Pat Proffitt as "Mr. Proffitt," Jessie Proffitt as "Jessie," and Ben Proffitt as "Ben."

attended the party. Mr. Proffitt had hosted other parties on the property with no violent incidents resulting, including a pig roast attended by Mr. Bailey. For the party at issue, Mr. Proffitt brought a camper to the property and provided food. Guests brought their own alcohol, and Mr. Proffitt stipulated to the fact that he knew guests would be bringing alcohol. There was some disputed deposition testimony regarding whether Mr. Proffitt offered a small amount of moonshine to some guests. Mr. Proffitt neither made nor attempted to enforce any rules regarding alcohol or weapons at the party.

The party began at about 3:00 p.m. with Mr. Proffitt, Ben, and Jessie present. Guests came and went throughout the late afternoon and evening. Many of the guests were musicians and performed throughout the night. Mr. Bailey arrived between 8:30 and 9:00 p.m. He sang some songs and listened to live music with other guests. At about 9:00 p.m., an altercation broke out between the brothers, Jessie and Ben, and Mr. Proffitt broke up that dispute. There were no claims of other altercations at the gathering until the one resulting in Mr. Bailey's injury.

Mr. Proffitt left the party by 11:00 p.m. Also at about 11:00 p.m., Mr. Bailey called Alisha Johnson and Kelly Gorrell, inviting them to the party. Ms. Johnson and Ms. Gorrell arrived at 12:30 a.m. Ms. Gorrell agreed at that time that she would give Mr. Bailey a ride home when he was ready to leave. By 1:30 to 2:00 a.m., the live music had stopped, and there were seven or eight people remaining at the party, including Mr. Bailey, Roger Vall Grooms, Jessie, Ben, Ms. Johnson, and Ms. Gorrell. All but Mr. Bailey were gathered around a truck, which had cocaine on the hood. Mr. Bailey was sitting away from the truck at a fire pit. According to their depositions, Mr. Bailey, Mr. Grooms, and Jessie had each consumed at least twelve beers over the course of the afternoon and evening.

At 2:30 to 3:00 a.m., Mr. Bailey asked Ms. Johnson to tell Ms. Gorrell that he wanted to go home, and then he waited fifteen minutes after Ms. Johnson told him that Ms. Gorrell was "not ready to go yet." Mr. Bailey then approached Ms. Gorrell and said, "Whore take me home." At that point, Jessie told Mr. Bailey to leave. Mr. Bailey refused to leave on foot and said that he would go when Ms. Gorrell gave him a ride. A physical altercation ensued between Jessie and Mr. Bailey. Mr. Bailey testified in his deposition that Jessie punched him before hitting him with a microphone stand. Jessie testified in his deposition that during the altercation, he hit Mr. Bailey with a microphone stand and also "kicked and stomped" Mr. Bailey. However, Jessie testified that he hit Mr. Bailey only after Mr. Bailey pulled a knife and said, "I'll cut your Goddamn guts out." No knife was found at the scene.

Mr. Grooms testified in his deposition that he repeatedly tried to retrieve his guitars and leave, but Mr. Bailey stood in his way and threatened to "cut him." Mr. Grooms admitted that he showed his gun to Mr. Bailey. Ultimately, the gun went off when Jessie attempted to intervene between Mr. Grooms and Mr. Bailey. Mr. Bailey was shot in the right arm.

Ben then took Mr. Bailey to Baptist Hospital in Cocke County, dropping Mr. Bailey off in the Emergency Room parking lot. After initial treatment at Baptist Hospital, Mr. Bailey was flown

to the University of Tennessee Medical Center in Knoxville (“UT Medical Center”) by Lifestar. In addition to the gunshot wound to his arm, Mr. Bailey suffered a fractured nose, concussion, and hearing loss in his right ear. He was released from the UT Medical Center two days later.

Mr. Bailey filed suit for negligence against Mr. Proffitt, Mr. Grooms, and Jessie, both jointly and separately.<sup>2</sup> All three defendants affirmatively pled the doctrine of comparative negligence.

Mr. Proffitt filed a motion for summary judgment, which the trial court granted on June 9, 2008, after a hearing on the motion. The trial court held that Mr. Bailey had no cause of action against Mr. Proffitt because:

Defendant, Pat Proffitt, did not owe a duty of care to Plaintiff at the time of his injuries. Specifically, hosting an adult party on his property, attended by adults, did not create a legal duty on the part of Defendant, Pat Proffitt, to prevent the adult individuals who attended the party from becoming intoxicated. Defendant, Pat Proffitt, did not impose any rules upon guests which he failed to enforce. . . . Further . . . it was not reasonably foreseeable to Defendant, Pat Proffitt, that a weapon would be drawn by one of the individuals and that Plaintiff would be shot and injured.

Mr. Bailey timely appealed.

## II. ISSUES

The central issue of this appeal is whether the trial court erred in holding that Mr. Proffitt did not owe a duty of care to Mr. Bailey at the time that Mr. Bailey was injured. Mr. Bailey characterizes this issue as whether it was foreseeable by Mr. Proffitt that Mr. Bailey would be injured by a gunshot wound from another guest. Mr. Proffitt characterizes this issue as whether a private property owner and social host owes a legal duty to a social guest to protect the guest from injury inflicted by other guests. Each of these characterizations focuses on a requisite part of the full duty analysis required in Tennessee. We restate the issues as follows:

- A. Whether the trial court erred in holding that Mr. Proffitt's relationship to Mr. Bailey, as a private property owner and social host to a social guest, did not give rise to a legal duty of care to prevent his adult guests from becoming intoxicated and injuring each other.
- B. Whether the trial court erred in holding that Mr. Proffitt did not assume a legal duty of care to prevent his adult social guests from becoming intoxicated and injuring each other.

## III. STANDARD OF REVIEW

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<sup>2</sup>This appeal concerns only the summary judgment entered for Appellant, Pat Proffitt.

In reviewing a trial court's grant of a motion for summary judgment, this court must determine whether the requirements of Tenn. R. Civ. P. 56 have been met. *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 88 (Tenn. 2000). Our inquiry involves only a question of law with no presumption of correctness attached to the lower court's judgment. *Id.* Under Tenn. R. Civ. P. 56.04, "[s]ummary judgment is appropriate when the moving party can show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law." *Hannan v. Alltel Publ'g*, 270 S.W.3d 1, 5 (Tenn. 2008) (citing Tenn. R. Civ. P. 56.04; *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993)). In Tennessee, the moving party has the burden of production and to shift that burden to the nonmoving party must either

- (1) affirmatively negate an essential element of the nonmoving party's claim; or
- (2) show that the nonmoving party cannot prove an essential element of the claim at trial.

*Hannan*, 270 S.W.3d at 9. A "conclusory assertion" is not enough to shift the burden. *Id.* at 5 (quoting *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993)). It is also not enough for the moving party to "cast doubt on a party's ability to prove an element at trial." *Hannan*, 270 S.W.3d at 8. Therefore, summary judgment for Mr. Proffitt was warranted if he could either affirmatively negate an essential element of Mr. Bailey's negligence claim or show that Mr. Bailey would not be able to prove an essential element of negligence at trial.

#### IV. ANALYSIS

##### A. LEGAL DUTY OF CARE

To successfully establish a negligence claim, a plaintiff must prove the following essential elements: "(1) a duty of care owed by defendant to plaintiff; (2) conduct below the applicable standard of care that amounts to a breach of that duty; (3) an injury or loss; (4) cause in fact; and (5) proximate, or legal cause." *Giggers v. Memphis Hous. Auth.*, 277 S.W.3d, 359, 364 (Tenn. 2009) (quoting *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995)). The threshold element is duty of care because without a legal duty, there can be no conduct that breaches the duty. *See Hale v. Ostrow*, 166 S.W.3d 713, 715 (Tenn. 2005) (analyzing whether a property hazard was the cause of the plaintiff's injury only if the property owner owed a duty to the plaintiff). The analysis of duty is specific to the particular plaintiff and defendant in the case at bar. *Nichols v. Atnip*, 844 S.W.2d 655, 662 (Tenn. Ct. App. 1992). Whether this defendant owes a duty is a question of law, and then whether that duty has been breached is a question of fact. *Giggers*, 277 S.W.3d at 366; *see also Biscan v. Brown*, 160 S.W.3d 462, 478 (Tenn. 2004). Thus, in the case at bar, the trial court's holding for summary judgment is appropriate if as a matter of law, Mr. Bailey would be unable to show that Mr. Proffitt owed him a duty of care at the time of his injury.

Tennessee has long recognized a general duty of care for which an individual must refrain

from misfeasance, an affirmative action that creates an “unreasonable risk of harm” to another. *Giggers*, 277 S.W.3d at 364 (quoting Restatement (Second) of Torts § 302 (1965)). However, courts have not generally imposed a duty for nonfeasance, or failure to act in a way that would prevent harm to another. *Giggers*, 277 S.W.3d at 364 (citing W. Page Keeton, et al, *Prosser and Keeton on the Law of Torts* § 56, at 373 (5th ed. 1984)). Despite this general rule, a duty for nonfeasance, and thus liability for inaction, does arise for certain special relationships, such as parent to child and landlord to tenant. See *Giggers*, 277 S.W.3d at 364 (citing *Lindsey v. Miami Dev. Corp.*, 689 S.W.2d 856, 860 (Tenn. 1985)) (noting that the special relationship between landlords and tenants places “an obligation on landlords to use reasonable care to protect tenants against unreasonable risk of foreseeable harm”); *Biscan v. Brown*, 160 S.W.3d 462, 479 (Tenn. 2005) (citing with approval the “socially recognized relations” of “parent and child, employer and employee, and innkeeper and guest” in the Restatement (Second) of Torts §§ 314-315 (1965)). The special relationship must be between either the defendant and the plaintiff or the defendant and a third party accused of causing the plaintiff’s injury. *Biscan*, 160 S.W.3d at 478-79.

The first issue in this case is then whether a private property owner who is a social host stands in a special relationship to his social guests. Mr. Bailey relies on *Biscan* for Restatement examples of the social relationships noted above. He argues that because the Restatement examples are “illustrative, not exclusive,” the trial court erred in not finding a special relationship between Mr. Proffitt as a property owner and his social guests, requiring him to control his guests’ behavior so that they would not become intoxicated and injure each other.<sup>3</sup> Tennessee courts have recognized a property owner’s duty of care toward social guests or business invitees to remove or warn against dangerous physical conditions on the premises and to render aid if the owner is present and knows or should know that the guest or invitee is injured and in need of aid. See, e.g., *Rice v. Sabir*, 979 S.W.2d 305, 308, 310 (Tenn. 1998) (concluding that a special relationship existed between a homeowner and a contractor hired to work on her property, but holding that the homeowner did not have a duty to warn the contractor of mildew on her roof because “the risk of harm was not reasonably foreseeable and did not outweigh the burden of preventing the harm from occurring”); *Lindsey v. Miami Dev. Corp.*, 689 S.W.2d 856, 860 (Tenn. 1985) (holding that a property owner owed a duty of care to his lessee and social guest to exercise reasonable care in rendering aid after the lessee/guest fell from a balcony).

Mr. Bailey ultimately “insists” that this court should adopt Restatement of Torts § 318 (1965), which states:

If the actor permits a third person to use land or chattels in his possession otherwise than as a servant, he is, if present, under a duty to exercise reasonable care so to *control the conduct of the third person as to prevent him from intentionally harming*

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<sup>3</sup>Mr. Bailey does not raise the argument that Mr. Proffitt stood in a special family relationship to his son, Co-Defendant Jesse Proffitt. Because Jesse was an emancipated adult at the time of the gathering, the parent-child exception does not apply, meaning that Jesse stands in the same relationship to Mr. Proffitt as other guests for the purpose of a duty analysis. *Nichols*, 844 S.W.2d at 662 (“The family relationship alone is not a ‘special relation’ because it does not necessarily carry with it the capacity or authority to control.”) (internal citations omitted).

others or from so conducting himself as to create an unreasonable risk of bodily harm to them if the actor

- (a) knows or has reason to know that he has the ability to control the third person, and
- (b) knows or should know of the opportunity for exercising such control.

(Emphasis added.) Mr. Bailey’s argument regarding Restatement § 318 is unavailing because “this court specifically has declined to adopt the special relationship between private property owners and their guests recognized in section 318 of the Restatement.” *Newton v. Tinsley*, 970 S.W.2d 490 n.3 (Tenn. Ct. App. 1997) (citing *Nichols*, 844 S.W.2d at 662).<sup>4</sup> In declining to adopt Restatement § 318, Tennessee courts have declined to recognize a special relationship between property owners and their adult guests that would give rise to a duty for social hosts to control the behavior of adult guests. Instead, we have analyzed such cases individually for factors that would give rise to a special relationship between the specific plaintiff and defendant. *See Biscan*, 160 S.W.3d at 480-82.

To determine whether a defendant owed a duty of care to a particular plaintiff, Tennessee courts “must first establish that the risk [of harm] is foreseeable, and, if so, must then apply a balancing test based upon principles of fairness to identify whether the risk was unreasonable.” *Giggers*, 277 S.W.3d at 365 (citing *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 366 (Tenn. 2008)). Foreseeability of the harm does not then immediately give rise to a duty of care, but foreseeability must be established as a threshold to the duty analysis. *Giggers*, 277 S.W.3d at 365-66 (“Although no duty will arise when a risk of injury is not generally foreseeable, foreseeability alone ‘is not, in and of itself, sufficient to create a duty.’”) (quoting *Satterfield*, 266 S.W.3d at 366). If foreseeability is established, the court will then determine whether the risk to the plaintiff was unreasonable, such that “the foreseeable probability and gravity of harm posed by defendant’s conduct outweigh the burden upon defendant to engage in alternative conduct that would have prevented the harm.” *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995) (citing Restatement (Second) of Torts, § 291 (1964)); *see also Satterfield*, 266 S.W.3d at 365.

In this case, the trial court held that the risk of injury to Mr. Bailey from another social guest firing a gun was not foreseeable by Mr. Proffitt. If there is no genuine issue of material fact that Mr. Bailey could show to prove foreseeability, then because there can be no duty without foreseeability, Mr. Bailey would be unable to prove an essential element of his negligence claim at trial, and

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<sup>4</sup>Recently in *Downs ex rel. Downs v. Bush*, the Tennessee Supreme Court listed recognized special relationships as including “possessor of land and guests, social hosts and guests.” 263 S.W.3d 812, 820 (Tenn. 2008). *Downs* did not involve a host-guest relationship, and the authorities cited by the *Downs* Court for special relationships included only one case involving such a relationship, in which the Court had held for the duty to render aid. *Downs*, 263 S.W.3d at 820 (citing *Bradshaw v. Daniel*, 854 S.W.2d 865, 872 (Tenn. 1993) (holding for a physician-patient relationship); *McClung v. Delta Square Ltd. P’ship*, 937 S.W.2d 891, 895 (Tenn. 1996) (holding for a business owner-customer relationship); *Lindsey*, 689 S.W.2d at 660 (holding for a property owner’s duty to render aid, if present, to an injured guest/lessee); Restatement (Second) of Torts § 314(a). The *Downs* Court did not refer to Restatement (Second) of Torts § 318.

summary judgment for Mr. Proffitt would be warranted. However, if a genuine issue of material fact is in question regarding the foreseeability of Mr. Bailey's injury, the trial court's order of summary judgment would be in error.

To determine foreseeability in a duty analysis, we consider whether there was "some probability or likelihood of harm that [was] serious enough to induce a reasonable person to take precautions to avoid it." *Satterfield*, 266 S.W.3d at 367; *see also Downs ex rel. Downs v. Bush*, 263 S.W.3d 812, 820 (Tenn. 2008). In *Satterfield*, the Tennessee Supreme Court held that it was foreseeable to an employer that its employees would expose their family members to asbestos through close contact with contaminated clothes when those clothes were worn off the company's premises. 266 S.W.3d at 367. In holding for foreseeability, the *Satterfield* Court also noted the plaintiff company's "extensive and superior knowledge" of the dangerous risk posed by asbestos. *Id.* In an earlier analysis of foreseeability involving a social host, the *Biscan* Court held that it was foreseeable to an adult social host that minor guests allowed to drink alcohol on the host's premises would become intoxicated and drive. 160 S.W.3d at 481. In contrast, this court noted the *Biscan* analysis while still holding that it was unforeseeable to adult hosts that a sober guest would, after leaving the host's premises, allow an intoxicated minor to drive his vehicle. *Puckett v. Roberson*, 183 S.W.3d 643, 652 (Tenn. Ct. App. 2005). The distinction was that the host in *Puckett* could not reasonably have had knowledge that one of his guests would act in an unpredictable and potentially dangerous way. *See id.*

In the case at bar, the trial court held that the injury to Mr. Bailey was not reasonably foreseeable because Mr. Proffitt could not have known that another guest would draw a weapon and that Mr. Bailey or any other guest would be shot and injured. According to all deposition testimony, the only altercation that occurred when Mr. Proffitt was present was a brief fight between his two adult sons, Jesse and Ben. Mr. Bailey argues that Mr. Proffitt's intervention in this fight indicates that he knew violence between guests was foreseeable. This conclusion simply does not follow. Mr. Proffitt saw his two sons arguing about mud tracked into a camper. The argument began to get physical, and Mr. Proffitt stopped it. He did not see either of his sons arguing with other guests, and he did not see any other guests arguing with each other, let alone physically fighting. Two hours passed between the time that Mr. Proffitt stopped his sons' argument at approximately 9:00 p.m. and when Mr. Proffitt left the property for the night at 11:00 p.m. No fights broke out in that time, and Mr. Bailey offered no evidence that Mr. Proffitt had knowledge of potential fights among guests or of guests carrying weapons.

Mr. Bailey argues that in a rural area such as Cocke County, it is foreseeable that guests will bring weapons to an outdoor party. Mr. Bailey is asking this court to establish a special rule for rural areas, perhaps particularly for Cocke County, saying that social hosts must guard against their guests shooting each other at outdoor cook-outs and other gatherings. To follow this argument to its conclusion would mean that social hosts, but only in Cocke County and other rural counties, would have to take special action, such as searching guests on arrival for weapons and requiring that weapons be checked and locked up safely. Mr. Bailey did not present and this court is certainly unable to produce any Tennessee statute or case precedent that would single out social hosts in rural

counties for such a dubious distinction. Because the injury to Mr. Bailey was not reasonably foreseeable by Mr. Proffitt, we decline to apply the balancing analysis for unreasonability of risk. *See Satterfield*, 266 S.W.3d at 366 (“[I]f a risk is foreseeable, courts then undertake the balancing analysis.”).

## B. ASSUMPTION OF DUTY

Mr. Bailey asserts that Mr. Proffitt “undertook” a duty to control his guests’ behavior when he intervened in the fight between Jesse and Ben. He also argues that Mr. Proffitt displayed his feeling of responsibility toward his guests by testifying that he would have stayed longer on the property if he had felt there was any danger to his guests. Although not stated in this way, Mr. Bailey has raised the issue of whether Mr. Proffitt voluntarily assumed a duty of care to Mr. Bailey and other guests by his actions even if he did not owe his guests a common law duty of care. “One who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully.” *Biscan*, 160 S.W.3d at 483-83 (quoting *Stewart v. State*, 33 S.W.3d 785, 793 (Tenn. 2000)).

Mr. Bailey relies on *Biscan* in arguing that Mr. Proffitt assumed a duty and then abandoned it. In *Biscan*, the co-defendant and social host was a father giving a party for his daughter’s eighteenth birthday. 160 S.W.3d at 467. As with Mr. Proffitt, the father in *Biscan* claimed not to have furnished any alcohol to his guests, but he admitted to expecting that the guests would bring and consume alcohol. *Id.* A key distinction between the two cases, however, is that the guests in *Biscan* were minors. *See id.* The father in *Biscan* had previously established a “rule” with his daughter that if any guests at the party became intoxicated, they would have to turn in their car keys and spend the night at the father’s house. *Id.* The father and daughter publicized the rule to some of the guests. *Id.* At previous parties, the father had “corralled” the underage guests’ cars so that no one could leave without his knowledge. *Id.* at 481. However, on the night at issue, the father fell asleep in another room and made no effort to enforce his rule or otherwise keep the minor guests from driving. *Id.* at 482. The *Biscan* Court held that the defendant/social host had voluntarily assumed a duty to protect his underage guests from “the consequences of drinking and driving,” and that in failing to enforce his rule or take other preventative action, he had breached that duty. *Id.* at 483.

In the case at bar, the trial court concluded that Mr. Proffitt “did not impose any rules upon the guests which he failed to enforce.” Mr. Bailey argues in his brief that if guests became “obnoxious and intoxicated,” Mr. Proffitt had the “means and ability to either remove them from the property . . . or to call the Sheriff’s Department and have them removed from the property.” The record shows that only one guest was asked to leave the property, and that guest was Mr. Bailey. It is undisputed that Jesse told Mr. Bailey to leave the party a few minutes before the shooting incident took place. By that time, Mr. Proffitt had been gone from the party for three to four hours. No evidence was presented to show that Mr. Proffitt had any kind of arrangement with Jesse such that guests would be asked to leave if their behavior became problematic. In addition, Mr. Bailey did not leave when asked, demonstrating that Mr. Proffitt would not have had the means and ability to control the adult guests even if he had established an arrangement with Jesse. Finally, it would be

unreasonable to conclude that a social host must keep the Sheriff's Department on call to remove "obnoxious and intoxicated" guests in order to protect his other adult guests.

In *Biscan*, the Court's conclusion that the defendant had assumed a duty reinforced its conclusion that the adult host owed a common law duty to his minor guests because he stood in a special relationship to them. Therefore, this case is distinguishable from *Biscan* on several points, only one of which is that Mr. Proffitt had imposed no rules on his guests. First, a special relationship arose in *Biscan* in great part because the social guests were minors, and "public policy considerations favor imposing a duty to act for the protection of minors where such a duty might be absent when dealing with adults." *Biscan*, 160 S.W.3d at 480. The legislature has clearly delineated public policy that "minors are generally prevented from consuming alcohol." *Id.* Second, the *Biscan* Court held it foreseeable that teenage party guests would consume alcohol and then drive. *Id.* at 481. Although it is foreseeable that adult party guests will consume alcohol, it is not reasonably foreseeable that they will draw weapons while at a social gathering.

The only fact in dispute regarding Mr. Proffitt's behavior toward his guests is whether he provided moonshine to a few individuals. Viewing this disputed fact in the light most favorable to Mr. Bailey, we conclude that even if Mr. Bailey could prove that Mr. Proffitt provided moonshine to his guests, that action would not give rise to a duty of care toward those guests or serve to show that Mr. Proffitt had assumed a duty of care. Mr. Proffitt still had not established rules with his guests, nor could he foresee that consumption of moonshine would lead to the drawing of weapons in a social atmosphere.

In addition, under Tenn. Code Ann. § 57-10-101, "the *consumption* of any alcoholic beverage or beer rather than the furnishing of any alcoholic beverage or beer is the proximate cause of injuries inflicted upon another by an intoxicated person." (Emphasis added.) Even if Mr. Bailey could have established that Mr. Proffitt owed his guests a duty of care, he would have been statutorily barred from showing that the act of furnishing alcohol was the legal or proximate cause of his injury. *See Biscan*, 160 S.W.3d at 472 ("The effect of section 101 is to make it impossible for one who has been injured by an intoxicated person to state a claim for negligence against the person or entity who furnished the alcoholic beverage or beer because the statute removes, as a matter of law, the required element of legal causation."). Legal causation is an essential element of a negligence claim. *Giggers*, 277 S.W.3d at 364 (internal citation omitted). Therefore, whether Mr. Proffitt furnished moonshine to some guests is not a genuine issue of material fact in this negligence action.

## V. CONCLUSION

As a property owner and social host, Mr. Proffitt neither owed a legal duty of care nor assumed a duty of care to prevent his social guests from becoming intoxicated and injuring each other. Because duty is an essential element of a negligence action, Mr. Proffitt, as the moving party, has successfully shown that Mr. Bailey would be unable to prove an essential element of his claim at trial. Therefore, the trial court's order of summary judgment is affirmed in its entirety. The costs on appeal are assessed against Appellant, Tippy Lynn Bailey.

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JOHN W. McCLARTY, JUDGE